The safest and most impartial policy for our tribunals to adopt requires that they disregard as much as possible the existence of a *status belli* and enforce contracts between alien belligerents exactly as if matters were on a peace footing,[9] except in cases where the enforcement would either result in a breach of our neutrality, or involve our courts in the determination of questions wholly political in nature.

TRIAL BY JURY IN HABEAS CORPUS PROCEEDINGS.—To the many important legal points that have come before the courts for determination in the course of the litigation connected with the notorious case of Harry K. Thaw, there has been added the question of a judge's right to call a jury in habeas corpus proceedings. The New York Court of Appeals, by refusing to grant a prohibition against the justice hearing the return of the writ, has held that a judge to whom the Chancellor's powers has descended, may in habeas corpus proceedings follow the equitable practice of summoning a jury to render an advisory verdict. *People ex rel. Woodbury* v. *Hendrick* (1915) 215 N. Y. 339. Accepting the holding that such a course is consistent with the Code provision for a summary hearing,[1] we still find the applicability of the equitable procedure not without difficulties.

The writs of habeas corpus in various forms were originally mere writs of procedure,[2] but from them developed the high prerogative writ which has been considered of such importance as a means of securing the personal liberty of the individual, that its inviolacy has been assured by provisions in the Federal Constitution[3] and the constitutions of most of the states.[4] The writ was in common use in King's Bench from early times, and the earlier writers asserted the Chancellor's right to issue it,[5] especially in vacation.[6] Its infrequent use in Chancery, however, led doubts to be cast upon that court's

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that these tribunals should refuse to apply war measures designed to give friendly plaintiffs penal advantages.

[9]The federal case might be distinguished from the New Jersey decision on the ground that the contract litigated in the latter called for transfer of land situate within the state and consequently, that greater reason existed for the court to take jurisdiction. Significantly enough, however, the New Jersey court does not confine itself to this point, evidently inclining toward the view that the transfer of land located in the jurisdiction is but one of many rights an alien belligerent ought to be entitled to enforce in a neutral tribunal against his enemy. But see 81 Central Law Journal, 217.

[1]N. Y. Code Civ. Proc., § 2039. Although provisions that hearings be summary are usually held to allow of slight delays, *Ex parte* Ryan (1909) 124 La. 356, the principal case recognizes that a jury trial would not be permissible in cases where a jury could not be promptly procured.

[2]Holdsworth, History of English Law, 97.

[3]U. S. Const., Art. I, § 9.

[4]Church, Habeas Corpus (2nd ed.) § 47; 2 Spelling, Injunctions (2nd ed.) § 1159.

[5]4 Coke, Inst., 81; 2 Hale, Pleas of the Crown, 145, 147; Bac. Abr., "Habeas Corpus" (B) § 1.

[6]The right was not usually exercised in term time, the custom being to refer the matter to the law courts in order "to facilitate the administration of justice, by equalizing as far as may be, the calls upon the time of the judges." Rowe's Case (1828) 1 Molloy 280.

jurisdiction over the writ,[7] until conferred in certain cases by the Habeas Corpus Act;[8] but later cases sustained the position of the earlier writers.[9] The right was vested in the Chancellor by virtue of his position as a common law judge, and therefore issued from the Latin side of Chancery as a part of his ordinary, not his extraordinary or equitable jurisdiction.[10] This fact has been recognized by the courts of New York,[11] which preserve the distinction between equitable and legal causes of action.[12] Even though the Chancellor had jurisdiction over children and persons *non compos mentis* by delegation of the executive power of the King as *parens patriæ*,[13] habeas corpus proceedings as to their custody were based on common law, although calling for the exercise of equitable principles in courts of law as well as of equity.[14]

From earliest times it has been the practice of the common law judges to decide both fact and law on the return of the writ of habeas corpus.[15] One writer has asserted that the common law courts have the power to summon a jury,[16] but there is no record of an exercise of such power and, in view of the well established practice of the courts, it is very doubtful whether such a right exists today.[17] In spite of constitutional guaranties of a trial by jury in cases where it was employed at common law, the right to demand a jury trial in habeas corpus proceedings has been universally denied.[18]

If we regard habeas corpus before the Chancellor as a common law question, the common law procedure ought to apply, for the equitable procedure was followed only in equitable questions, although it must

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[7]Jenkes's Case (1678) 6 How St. Tr. 1189, 1196, and notes on the case by Lord Nottingham, who rendered the decision, published in Crowley's Case (1818) 2 Swanst. 1, 83. Justice Wilmot, in his opinion to the House of Lords, (1758) 1 Wilm. 77, 100-101, says: "For no writ of habeas corpus can be found to have ever issued out of the Court of Chancery, except some returnable in the House of Lords."

[8]31 Car. II, c. II, § 10.

[9]Crowley's Case, *supra*; *In re* Belson (1850) 7 Moore P. C. 114.

[10]4 Coke, Inst., 79, 81; Crowley's Case, *supra*; *In re* Belson, *supra*.

[11]People *v.* Mercein (N. Y. 1839) 8 Paige Ch. 47; Mercein *v.* People (N. Y. 1840) 25 Wend. 64; People *v.* Moss (N. Y. 1896) 6 App. Div. 414.

[12]Toplitz *v.* Bauer (N. Y. 1898) 26 App. Div. 125; see also Omaha Fire Ins. Co. *v.* Thompson (1897) 50 Neb. 580.

[13]People *v.* Moss, *supra*; Goldsmith *v.* Valentine (1910) 36 App. D. C. 63. Pomeroy recognizes this origin as to persons of unsound mind, 3 Pomeroy, Eq. Jur. (3rd ed.) § 1311, but questions it as to infants, § 1304.

[14]Goldsmith *v.* Valentine, *supra*; People *v.* Moss, *supra*; but see Knapp *v.* Tolan (1913) 26 N. D. 23.

[15]Church, Habeas Corpus (2nd ed.) § 172.

[16]*Ibid.*

[17]State *v.* Farlee (1790) 1 N. J. L. 41; Garner *v.* Gordon (1872) 41 Ind. 92. The early Pennsylvania cases, however, seem exceptions, a dictum in Respublica *v.* Gaoler (Pa. 1797) 2 Yeates 258, being followed in the Common Pleas in Graham *v.* Graham (Pa. 1815) 1 Serg. & R. 330.

[18]*In re* Chow Goo Pooi (C. C. 1884) 25 Fed. 77; Baker *v.* Gordon (1864) 23 Ind. 204; Pittman *v.* Byars (1908) 51 Tex. Civ. App. 83; Sumner *v.* Sumner (1903) 117 Ga. 229; People *v.* Chanler (N. Y. 1909) 133 App. Div. 159, aff'd. 196 N. Y. 525.

be admitted that the two methods were occasionally used interchangeably.[19] Since the common law procedure in habeas corpus involved no jury trial, it is only by a confusion of procedure that the Chancellor on the return of the writ could have exercised his right to obtain an advisory verdict. Although most of courts inherit the powers of Chancery as well as those of the old English law courts,[20] some have flatly denied their discretionary right to call a jury,[21] and the failure of others to exercise such a right may have been due to doubts as to their power.[22] It is rather surprising, then, that the New York courts should adopt such a questionable inheritance from Chancery,[23] especially in view of the fact that a different practice had become well established in procedure on the identical writ in the courts of common law.

RES IPSA LOQUITUR.—Although it is often loosely said that the application of the maxim *res ipsa loquitur* raises a presumption of negligence against a defendant that casts upon him the burden of proof,[1] this must not be understood as making it necessary for him to show by a preponderance of evidence the exercise of due care. Whenever it becomes necessary to distinctly advert to the difference between establishing a counter proposition and merely meeting a *prima facie* case, the courts clearly point out that although the burden of going forward with evidence may shift in the course of a trial, the *onus probandi* must always remain upon the plaintiff throughout, and that the rule *res ipsa loquitur* by authorizing a certain method of proof

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[19]Kerly, History of Equity, 49-56.

[20]McQuigan *v.* Delaware L. & W. R. R. (1891) 129 N. Y. 50; Omaha Fire Ins. Co. *v.* Thompson, *supra.*

[21]State *v.* Farlee, *supra*; Garner *v.* Gordon, *supra.*

[22]In *Ex parte* Davis (1846) 18 Vt. 401, it was said that the objection to habeas corpus as a means of releasing a debtor would be valid if the facts relied upon produced an issue suitable for a jury. In *Ex parte* Mosby (1869) 31 Tex. 566 the court said "upon habeas corpus the court or judge trying the cause is judge of the law and the facts". In New York, however, a reference was ordered in circumstances similar to those of the principal case, Matter of Dixon (N. Y. 1882) 11 Abb. N. C. 118, and authority for a jury trial in habeas corpus is sometimes claimed from the case of People *v.* Burns (1894) 77 Hun 92, aff'd. 143 N. Y. 665, where a jury was summoned on an order to show cause after a discharge on habeas corpus.

[23]It might be noted that the petitioner in the principal case was in confinement under a summary commitment by the judge after acquittal on the grounds of insanity in a criminal trial. The constitutionality of the statute authorizing such commitment was sustained in People *v.* Chanler, *supra,* on the ground that it permitted of a subsequent hearing, and this may well have made the desirability of a jury trial on the subsequent habeas corpus appear greater. In fact, another state has specifically authorized a jury trial on the return of the writ of habeas corpus in these cases, Gen. Laws R. I., Rev. of 1909, c. 96, § 19,—the awarding of such trial being in the courts's discretion, *In re* Palmer (1904) 26 R. I. 222,—but no such provision appears in the New York Code.

[1]See Orcutt *v.* Century Building Co. (1907) 201 Mo. 424, 441; Ligon's Admr. *v.* Evansville Rys. (Ky. 1915) 176 S. W. 968, 970; Norfolk Ry. & L. Co. *v.* Spratley (1905) 103 Va. 379, 384.